

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-4054

B
PL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

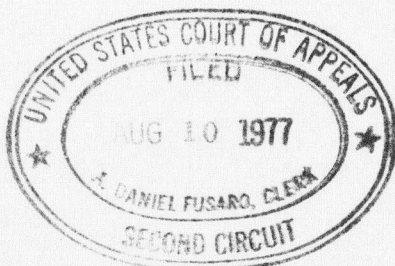
-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC.,

Intervenor.

On Petition for Review of an Order of the
Federal Communications Commission

PETITION OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION
FOR REHEARING



E. Edward Bruce
Mark D. Nozette
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452 6126

Attorneys for Intervenor
TRT Telecommunications Corporation

TABLE OF CONTENTS

STATEMENT	Page 2
ARGUMENT	3
CONCLUSION	13

TABLE OF CASES

<u>Bowman Transportation, Inc. v. Arkansas-Best Freight System,</u> 419 U.S. 281 (1974)	6
<u>Chesapeake & Ohio Railway v. United States,</u> 283 U.S. 35 (1931)	6
<u>FCC v. RCA Global Communications, Inc.,</u> 346 U.S. 86 (1953)	8
<u>FCC v. Schreiber,</u> 381 U.S. 279 (1965)	13
<u>FCC v. WJR,</u> 337 U.S. 265 (1949)	13
<u>FMC v. Aktiebolaget Svenska America Linien,</u> 390 U.S. 238 (1968)	6
<u>General Telephone Co. of the Southwest v. United States,</u> 449 F.2d 846 (5th Cir. 1971)	6
<u>Gulf States Utilities Co. v. FCC,</u> 411 U.S. 747 (1973)	6
<u>Nader v. FCC,</u> 520 F.2d 182 (D.C.Cir. 1975)	9
<u>National Ass'n of Reg. Utility Com'rs v. FCC,</u> 525 F.2d 630 (D.C.Cir. 1976)	6
<u>Pikes Peak Broadcasting Co. v. FCC,</u> 422 F.2d 671 (D.C.Cir. 1969)	12
<u>WBEN, Inc. v. United States,</u> 396 F.2d 601 (2d. Cir. 1968), cert. denied 393 U.S. 914	13
<u>United States v. Southwestern Cable Co.,</u> 392 U.S. 157 (1968)	11

OTHER AUTHORITIES

	Page
47 U.S.C. §154	11
§222(e) (3)	7
§312	12

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

On Petition for Review of an Order of the
Federal Communications Commission

PETITION OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION
FOR REHEARING

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, intervenor TRT Telecommunications Corporation ("TRT") hereby petitions this Court for rehearing of the decision rendered on July 27, 1977, by a panel of this Court, consisting of Judge Moore, who authored the opinion, Judge Gurfein, who concurred in Judge Moore's opinion, and Judge Feinburg who joined the result reached by the panel pursuant to a separate concurring opinion.

STATEMENT

The effect of the panel's decision in this case is to take from TRT and ITT World Communications Inc. ("ITT") and give to RCA Global Communications, Inc. ("RCA") approximately \$2 million in revenues per year. RCA is to receive these benefits solely because in 1943, when the "International Formula" for distributing unrouted international telegrams was adopted, RCA held the largest share of the international telegram market.^{1/} By the same token, TRT and ITT will once again be remitted to receiving about 1.4% and 11.4%, respectively, of all unrouted international telegrams (notwithstanding the fact that collectively today they account for nearly 40% of all traffic which is specifically routed by senders of international telegrams) solely because in 1943 when the original international formula was promulgated their market shares were less than those which they have won by competition today.

In thus resurrecting the now 34-year-old international formula, this Court committed two related errors, each one of which justifies rehearing of this case. First, the Court failed completely to recognize the blatantly anticompetitive consequences of the original 1943 international formula, which like a cartel, sought to maintain for a period of years stretching into decades

^{1/} Western Union International, Inc. ("WUI"), the fourth major international record carrier, will similarly profit from the panel's decision, albeit to a somewhat lesser extent than RCA.

the market shares for international telegraph traffic that obtained amongst the carriers in the early 1940's. Second, by testing the interim formula which the FCC prescribed to replace the 1943 formula as though it inevitably must lead to a different so-called "all-routed" system, the Court deprived the FCC of the use of interim procedures in dealing with complex and difficult questions, such as the one presented by the patent need to reform the distribution of unrouted international telegraph traffic.

ARGUMENT

I

Because the Court in its July 27 opinion virtually ignored the subject, we reiterate, albeit in abbreviated form, the material set forth at pages 5-11, 16-17 of TRT's brief on the merits which detailed the actual operation of the 1943 formula. Suffice to say here that that formula constituted a complex market-sharing device which perpetuated early 1940's market shares of the international record carriers by systematically taking unrouted traffic away from carriers who, via their promotional efforts, good service or otherwise, in subsequent years exceeded the market share which they had previously obtained.

The impact of the 1943 formula on TRT was particularly severe, since in the 1940's it was a regional carrier serving only a handful of points in Central America, the Caribbean and the northern rim of South America, whereas by the time of the Commission's decision TRT had expanded its operations so as to offer its services on a world-wide basis. And, even within TRT's traditional area of service, where it had through the introduction of improved service and the like raised its market share, the 1943 formula penalized TRT by limiting its transmission of unrouted messages solely to the Bahamas, Belize (formerly British Honduras) and Columbia (J.A. 313), in an attempt to depress TRT's market share for international telegram traffic to this area to levels more consistent with those which TRT realized more than 30 years ago.

By thus ignoring TRT's services to points outside its traditional area and by penalizing TRT for increased market share in that area, the 1943 formula gave TRT about one-fourth as much unrouted traffic as TRT had obtained in competing for routed traffic. Thus, although TRT now transmits 5.5% of all routed telegrams between the United States and the rest of the world, it receives only 1.4% of all unrouted traffic. (J.A. 15).

Corresponding to the formula's deprivation of traffic from TRT has been its assignment of surplus traffic to RCA. Thus, in 1974 RCA's percentage of routed message traffic had fallen to

33.12%, but the formula rewarded it with 48.2% of all unrouted traffic, in an attempt to restore RCA to the dominant position which it previously enjoyed. (J.A. 13). RCA's surplus came not only from traffic which was diverted from TRT, but also from traffic which ITT would otherwise have received.^{2/}

In the orders under review in this case, the Commission focused very directly upon the anticompetitive effect of the 1943 formula, recognizing that it systematically penalized carriers for competing for routed traffic and thus disregarded the "public's role" in the selection of international record carriers. (J.A. 26). The Commission recognized that the 1943 formula thus significantly "blunted" competition in international message service, contrary to the "vigorous competition" in which the IRCs engaged in offering their other services to the public. (J.A. 26). Accordingly, it expressed acute concern that the formula had "discouraged improvements in [the] quality" of message service. (J.A.17).

In considering the blatant anticompetitive consequences of the 1943 formula, the Commission was not only acting within the authority granted to it by the Communications Act, but it was carrying out the duties which Congress had imposed upon it to remove artificial restraints to competition when they serve no valid

^{2/} By 1974, ITT had achieved a market share for routed traffic that was slightly higher than RCA's, but received only 11.4% of all unrouted traffic. WUI also profited from diversion of TRT/ITT traffic, receiving 37.9% of unrouted via the formula, as compared to its actual routed market share of 26.5%. (J.A. 13).

regulatory purpose. For courts in a long line of cases both have reaffirmed that regulatory agencies may take account of the "policy in favor of competition embodied in the [federal] laws" in determining the feasibility of new competition in regulated industries ^{3/} and have identified a clear "antitrust component of the public interest, convenience and necessity standard" ^{4/} which requires the FCC and other agencies to consider the potential anticompetitive nature of industry practices or activities which fall within their regulatory jurisdiction. ^{5/} A fortiori they are required to be particularly sensitive to the anticompetitive consequences of rules, regulations or practices, like the 1943 formula, which agencies themselves have adopted or approved.

These legal principles demonstrate both the clear duty of the Commission in this case to take prompt action to bring to an end the cartel-like market allocations scheme of the 1943 formula

^{3/} Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 298 (1974). See also, Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); FMC v. Aktiebolaget Svenska America Linien, 390 U.S. 238 (1968); Chesapeake & Ohio Railway v. United States, 283 U.S. 35 (1931).

^{4/} National Ass'n of Reg. Utility Com'rs v. FCC, 525 F.2d 630, 636, 639 (D.C.Cir. 1976).

^{5/} General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971):

"[W]e note that not only is the [FCC] permitted to consider the anticompetitive potential of activities which fall within the purview of its jurisdiction, . . . in some instances it is obligated to consider them."



and the corresponding error of this Court in ignoring this aspect of the Commission's decision. For following a lengthy investigation, which took into account the results of an intensive survey of industry patterns, the Commission found, as the evidence compelled it to, that the 1943 formula systematically frustrated the competitive efforts of US international record carriers. A formula having such consequences was quite properly condemned by the FCC as "unjust, unreasonable or inequitable, or not in the public interest"^{6/} within the meaning of Section 222(e)(3) of the Communications Act, 47 U.S.C. §222(3)(3), and upon this finding the Commission became obliged by that section to prescribe a new formula for the distribution of such traffic which would not embody the vices of the old formula.^{7/}

The Court's July 27 decision did not in any way recognize this vital element of the Commission's decision. By virtue of this omission, this Court has rendered a decision which is inconsistent with all modern case law dealing with the obligations

^{6/} Even if the anticompetitive effects of the 1943 formula are ignored, the arbitrary diversion of traffic from TRT and ITT to RCA and WUI would, standing alone, render the 1943 formula "inequitable" within the meaning of §222(e)(3).

^{7/} Section 222(e)(3) provides that

"Whenever . . . the Commission finds that any such distribution of telegraph traffic among telegraph carriers . . . is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic . . . which will be just, reasonable, equitable and in the public interest . . ."

(emphasis supplied).

of administrative agencies to exercise their regulatory jurisdiction in a manner that takes cognizance of antitrust and competitive principles.^{8/}

Instead of dealing with the underlying issue in this case, the Court simply expressed dissatisfaction with the possibility that at some time in the future the Commission might mandate an all-routed system for international telegraph traffic. For that reason and that reason alone (see pp. 10-11, infra), the Court struck down in its entirety the Commission's earlier orders and thereby, in effect, reinstated the 1943 formula with all the attendant anticompetitive and inequitable consequences which no one in this case has ever justified.

^{8/} We particularly note the Court's misapplication of *FCC v. RCA Global Communications, Inc.*, 346 U.S. 86 (1953). Although the Court purported to recognize the Supreme Court's admonition in that case that "the Commission is not required to make specific findings of tangible benefit" which might be expected from adding new competition in international communications markets (346 U.S. at 96), in fact, by stressing the absence of any findings below concerning the precise way in which the quality of international telegraph services might be improved by the removal of the anticompetitive restraints contained in the 1943 formula (Op. p. 17), the Court was indeed requiring the Commission to demonstrate the tangible benefits that would emerge from invalidation of the 1943 formula. This Court's error in this regard is particularly glaring in the light of the fact that this case involves the "antitrust component" of the FCC's jurisdiction, focusing as it does on the removal of an artificial restraint upon competition, rather than the proposed entry of additional competitors in a market adequately served by others.

This disregard for the Commission's clear responsibility to eliminate the anticompetitive consequences of the 1943 formula should lead to a rehearing of this case. At the very least, this Court should address itself to the consequences of its mandate, insofar as it operates on the Commission's determination that the 1943 formula is unjust, unreasonable, or inequitable or not in the public interest. Specifically, the Court should determine whether, in the light of the correctness of the Commission's condemnation of the 1943 formula and the extended period of time which the Commission required to reach this determination, its mandate of July 27 is justified. In the alternative, the Court should consider a mandate that expressly leaves in tact the Commission's determination as to the 1943 formula and requires the Commission, within a relatively brief period (perhaps 30-60 days), to develop a new formula to be substituted for the 1943 formula which has been properly condemned. See Nader v. FCC, 520 F2d 182, 207 (D.C. Cir. 1975).

II

Closely related to the Court's error in setting aside the Commission's patently correct determination that the 1943 formula did not satisfy the requirements of Section 222(e)(3), was the Court's reliance on what it perceived to be inadequacies in the so-called "all-routed" procedure for distributing presently unrouted traffic in passing upon the lawfulness of the "interim" formula adopted by the Commission to replace the 1943 formula. For despite the fact that the interim formula contains none of



the defects of the all-routed scheme,^{9/} the Court plainly determined to strike down the interim formula because of deficiencies in the all-routed scheme.

That the Court judged the interim formula on the basis of ultimate implementation of an all-routed scheme is obvious from even a quick reading of the Court's opinion. For example at page 19 of the opinion the Court describes the interim formula as having "all the earmarks of finality," since, so the Court asserts, "all the parties are directed now to devote their efforts to forcing the public into an all-routed system." (Op.p.19). But, the Commission's orders contain no such direction and the "earmarks of finality" discerned by this Court are present only if one assumes, contrary to the record, that adoption of the all-routed scheme is a foregone conclusion.

9/ Thus, the "absurdities" which this Court stressed would attend the adoption of an all-routed scheme, such as requiring customers to read a "short history of the WU-IRC relationship" before selecting a carrier (Op. pp.15-16), simply do not obtain with respect to the interim formula. Under the interim formula, no customer is required to select a particular carrier to handle his traffic; all remain free to turn over their traffic to Western Union without designation of a particular IRC. The interim formula relies upon the experienced judgment of those customers who do chose to route their traffic as the basis for directing the traffic flow from those customers who do not care to route. In that sense, it represents a compromise between the all-routed scheme and an unrouted scheme which captures the best of both.

Moreover, the Court's determination that it was "not inappropriate" for the Commission to develop fully all the implications of an all-routed distribution scheme prior to the adoption of even an interim order, coupled with its holding that a change in the 1943 formula should be based upon "specific findings," presumably pertaining to such a scheme (Op. pp.20-21), make it abundantly clear that the Commission's interim formula was rejected because the Commission did not make findings sufficient to sustain the all-routed formula.

In thus striking down the interim formula, this Court has sub silentio, but nonetheless effectively, held that the Commission could not in the circumstances of this case deal with the problem of revising the 1943 formula on an interim basis, but instead was required to fully consider the consequences of and make findings concerning an all-routed scheme as a final solution to this problem. Such a ruling flies in the face of controlling Supreme Court precedent and ignores the flexibility which courts have stressed should be allowed to regulatory agencies addressing complex questions, such as those faced by the FCC here.

Most directly on point is the decision of the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157, 180-81 (1968). There, pending the outcome of a final policy determination concerning CATV, the FCC issued an interim cease and desist order pursuant to its general powers under Section 4 of the Communications Act, 47 U.S.C. §154. In so doing, it did not make the statutory findings which would have been required for the

adoption of a final cease and desist order pursuant to Section 312, 47 U.S.C. §312. Rejecting the contentions that such an interim order was unlawful, the Supreme Court, speaking through Mr. Justice Harlan, stressed the fact that agencies, like the FCC, "must possess sufficient flexibility" to issue interim orders pending final resolution of complex issues.

Similarly, the courts of appeal have stressed the use of interim procedures and temporary orders as a necessary device which the FCC and other agencies may use. Thus, in Pikes Peak Broadcasting Co. v. FCC, 422 F.2d 671, 681-82 (D.C.Cir. 1969), the parties complained of the adoption of an order pending the Commission's determination of broader policy issues in a related proceeding. In rejecting that argument, the D.C. Circuit held that "it is not reasonable to require the Commission to spell out premature solutions to all problems" prior to taking effective action in a particular case. 422 F.2d at 681. As the court continued:

"[E]ducated guesses are a necessary part of the Commission's job. 'It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience.'" 422 F.2d at 682.

Of course, this is precisely what the Commission attempted to do in connection with the instant case. Finding it "premature" to determine the propriety of an all-routed system, the Commission made findings adequate for the adoption of an interim formula, set up procedures to investigate an all-routed scheme, and thus

ensured there could be "expeditious" adjustment of the formula^{10/} for distributing unrouted traffic in the future.

Thus, the determination of this Court that the interim formula could be set aside because of the Commission's failure now to fully explore the implications of an all-routed approach ignores the unquestioned right of the FCC to utilize interim decision-making procedures. This Court has accordingly disregarded the Supreme Court's repeated holdings that

"Congress has 'left largely to the [FCC's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate' the proper dispatch of its business in the ends of justice."

FCC v. Schreiber, 381 U.S. 279, 289 (1965). See also, FCC v. WJR, 337 U.S. 265 (1949).

CONCLUSION

For the reasons stated above, this Court should reconsider and rehear its decision of July 27 and should alter the mandate in this case so as to allow substitution of the 1943 formula by the interim formula adopted by the Commission, pending its further

^{10/} See also, WBEN, Inc. v. United States, 396 F.2d 601, 614 (2d. Cir. 1968), cert. denied 393 U.S. 914.

- 14 -

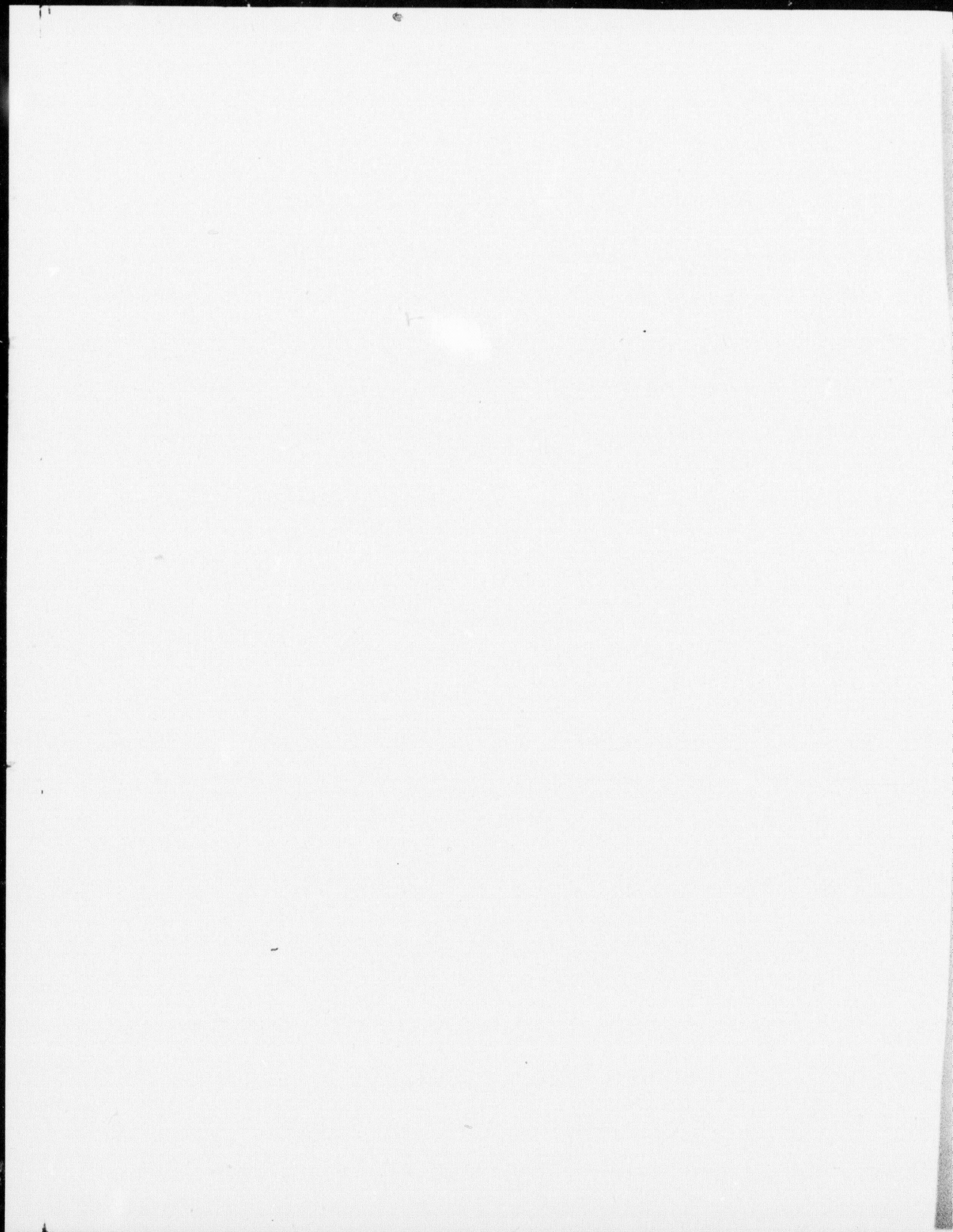
investigation into this matter.

Respectfully submitted,

E. Edward Bruce
Mark D. Nozette
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

(202) 452 6126

Attorneys for Intervenor
TRF Telecommunications Corporation



IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

Respondents,

-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

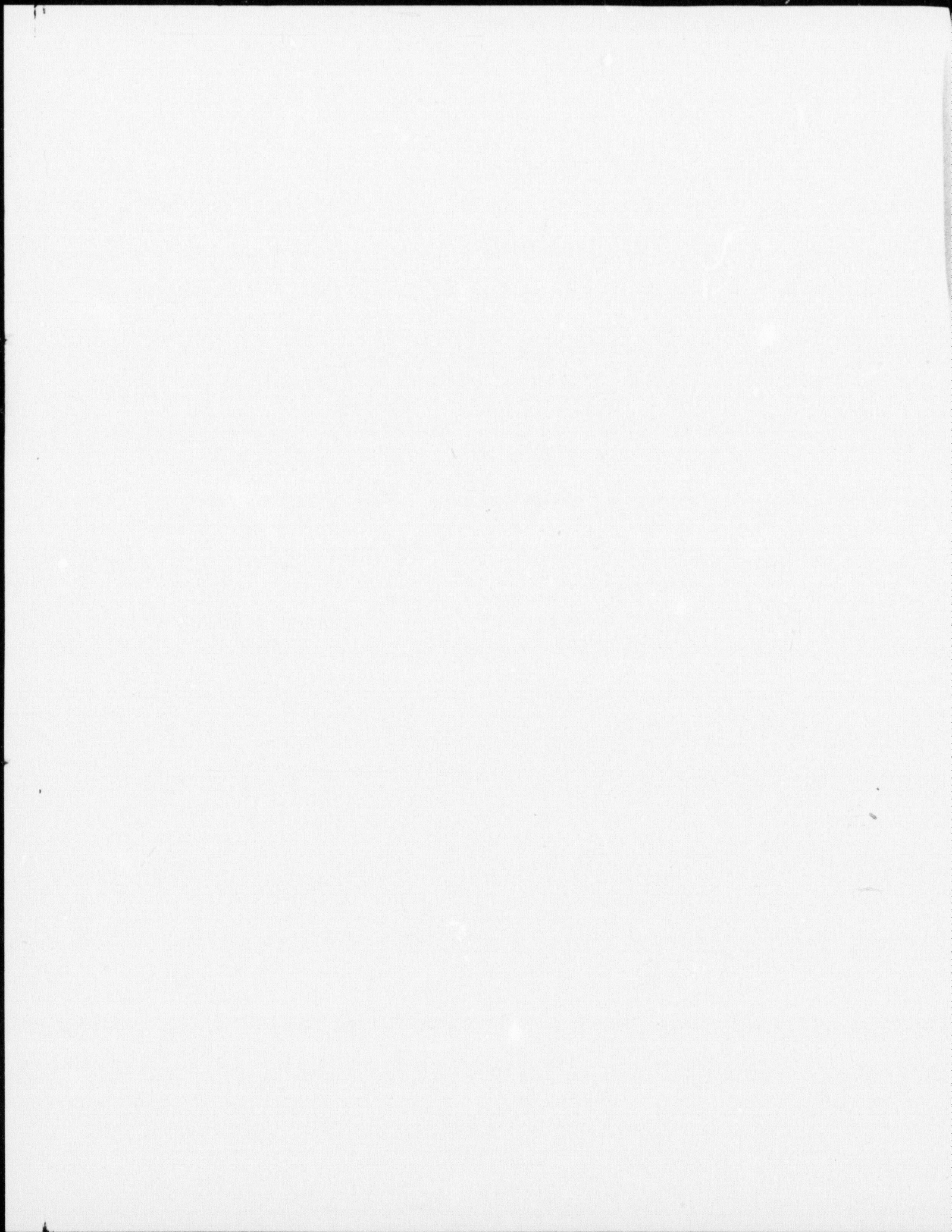
CERTIFICATE OF SERVICE

I, E. Edward Bruce, a member of the bar of this Court,
hereby certify that copies of the Petition of TRT Telecommunications
Corporation for Rehearing were served, by United States mail,
postage prepaid, this 10th day of August, 1977, upon the following
persons:

Donald I. Baker, Esq.
U.S. Department of Justice
Washington, D.C.

Alvin K. Hellerstein, Esq.
Stroock & Stroock & Lavan
61 Broadway
New York, New York
Counsel for Western Union International, Inc.

/



- 2 -

Charles P. Sifton, Esq.
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York
Counsel for ITT World Communications Inc.

H. Richard Schumacher, Esq.
Cahill Gordon & Reindel
Eighty Pine Street
New York, New York
Counsel for RCA Global Communications, Inc.

Jack Smith, Esq.
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554


E. Edward Bruce